IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ARTHUR A. WENHAM,
Appellant,
vs.
WLLIAM S. SWITZER,
Appellee.

BRIEF OF AARON H. NELSON,

Solicitor and Attorney for Appellee.

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STATEMENT OF THE CASE.

Brief of Counsel for Appellant is erroneous, both in omission and statement, in its presentation of the facts out of which this litigation has arisen. These errors are material and are:

First: In omitting to state that when Appellee (Defendant below) began the correspondence in this case by his letter

of October 2d, 1887, addressed to the Appellant (Plaintiff below) he, said Defendant, was already the owner of a half interest in the claim in controversy, and the possibility of his (Defendant's) being able to purchase the other one-half of said claim for Plaintiff, or for any friend of Plaintiff's, and for the sum of $1,500, was all that there was in the offer of the Defendant upon which this suit is founded.

Second: The final purchase of the second half of the claim in controversy was not (as counsel for Appellant states) the result of the correspondence between Plaintiff and Defendant, but was the accomplishment of Defendant's constant purpose—antedating even the beginning of his correspondence with Plaintiff—"to buy the ground whether he (Plaintiff below) took an interest or not." (See page 40 of Transcript.) With these amendments we accept Appellant's statement of the case.

ARGUMENT.

Appellant's first and second specifications of error are, by his own acknowledgement, untenable as grounds for reversal of the decision appealed from, the matter of allowing leading questions to be asked (especially in equity proceedings) being largely within the discretion of the Court.

Rice on Evidence, 1, Section 284.

In this case, however, the Court below ignored all the testimony elicited by such leading questions, using this language regarding the alleged letters, to which alone such questions referred: "But whether he wrote such letters or not," etc. This statement in the decision appealed from also directly contradicts the allegation of Appellant's seventh specification of error.

There remain, therefore, twelve specifications of error (out of the fifteen assigned in the decision below) for our consideration, and these, originating from the erroneous theory of Appellant that the transaction in question was *a contract creating an agency*, may all be considered at once by answering the sixth and last in the series of questions which Appellant states to be involved in this controversy, that being in point of fact first in importance, and comprehensive of all the others.

"Ought a specific performance be decreed?" asks Appellant's Counsel of this Court, and we are not venturing to put words in the mouth of the Court when we reply, "Certainly not, if no contract, either executed or executory, existed between these litigants at the time of the filing of the Plaintiff's bill in the Court below." "*Ex nudo pacto non oritur actio.*"

Not every agreement is a contract, and to the creation of every legal contract, three factors, jointly and severally essential to such legality, must be contributed. "First, the reciprocal or mutual assent of two or more persons; Second, a good and valid consideration; and Third, something to be done or omitted which is the object of the contract."

Chitty on Contracts, Vol. 1, page 11.

FIRST: then as to the "reciprocal or mutual assent" of the parties to this suit, which assent must be either clearly expressed or, by implication, must be plainly deducible from their correspondence.

The initial step in the transaction now in dispute is the proposition found in Defendant's letter to Plaintiff, dated October 2, 1887, as follows:

"Mr. Wenham, if you have a friend who desires half of a good claim lying alongside the Alta Lode, which I think can be got for $1,500, I wish you would let me know. Some time ago I bought one-half of it. It cost him $2,000. If you think a sale can be effected I will send you a copy or a plat of it, as it lays adjoining our ground, the Alta Lode claim, then you can come out or I will get a deed of it in the bank and the exchange can be made either way, and I will get it cheap, as any price can be had for it." (See exhibit 3, pages 47 and 48 of Transcript.)

That offer, and that offer alone, is alleged in the bill initiating this suit, as the origin of the contract of which Plaintiff demands specific performance. It appears, however, from the record that in a letter dated March 7th, 1888, Defendant wrote to Plaintiff, and (apparently alluding to his former letter of October 2d, 1887) said: "I think you will do well to secure the interest I spoke of, adjoining the Alta claim." (See exhibit 4, page 49, Transcript.) To that letter Plaintiff replied under date of March 15, 1888, and (in regard to the mining claim now in controversy) wrote: "Now, about the claim adjoining the Alta. *I want to go in with you. Could the interest be bought for $1,000?*" (See exhibit 5, page 49 of Transcript.) And again, under date of March 26th, 1888, Plaintiff wrote to Defendant, and regarding this claim said: "*If you should get the claim adjoining the Alta, all right; there is no hurry. We could not work it for some time to come.*" (See exhibit 6, page 50 of Transcript.) In reply to this letter of Plaintiff's, Defendant wrote, under date of April 13th, 1888, as follows: "And in relation to the interest nearest the Alta, it can't be had for less than about $1,500, *if it can be bought at any price*, but I shall know in about twenty days, and *I will write you as soon as I can get to know what I can let you have*

it for. He may get excited and ask more," and by way of postscript to the same letter Defendant adds; "One thing more, *if you conclude to take the interest* you had better send $1,500 to the First National Bank of Butte, as if you wait, it may slip in other hands." (See exhibit 7, page 51 Transcript.) This letter seems to have been intended also as a reply to a letter from Plaintiff, dated April 5th, 1888, in which he (Plaintiff) asks: "How about the claim adjoining the Alta claim. Can you secure the half you spoke of? Let me hear from you as soon as practicable." (See exhibit 8, page 52 Transcript.) Under date of April 23d, 1888, Plaintiff wrote to Defendant as follows: "Yours of the 13th at hand and contents noted. *According to your wishes I enclose you $500*, payable to your order. This is a New York draft and is as good as gold in the First National Bank in your city. In fact, the banks prefer drafts to currency. Now if you go quietly to work, and not let the parties who want to sell get excited, when he agrees to sell give him the $500 to bind the bargain, *and you can telegraph me for the other $1,000*, which I will send immediately on receipt of the notice, and if you can't buy all of his interest buy one-half of it. * * * * In regard to the claim next to the Alta, please keep it confidential until something is done; and by the way, what is the name of the claim? Please answer as soon as possible, that I may know you have received the money." And in a postscript to this letter Plaintiff adds: "If you did not want to use the money immediately you could make a special deposit in the bank until you needed it." (See exhibit 9, page 52 Transcript.) April 28th, 1888, Defendant replied to Plaintiff's letter of April 23d 1888, and regarding the claim in controversy wrote as follows: "Yours of the 23d, '88, is received,

with one check for $500 on the First National Bank of Cleveland, Ohio. The mining lode claim is known as the 'Ontario' or 'Burner Lode Claim.' Soon as I can hear from the parties the matter will be concluded. The money is in bank." (See exhibit 10, page 53 Transcript.)

Here let us pause to ask, where in these citations from the record is there the slightest proof discernible, that either Plaintiff or Defendant knew for what sum the one-half interest in the claim, concerning which they were corresponding, could be bought? Up to this date we find nothing more certain upon that point than that Defendant was confident *it could not be had for less than $1,500.* He did not, however, know that it could be bought for that sum. Is it not, therefore, evident that (in direct contradiction of the allegations of the Plaintiff's bill) on or prior to April 13th, 1888, nothing was done or had been done or written by Plaintiff, in which the "mutuality of the assent" essential on his part, to the alleged contract, is proven, or from which it could possibly be inferred? This being true of the Plaintiff, it must of necessity be equally true of the Defendant, unless it be the theory of the Plaintiff, that somewhere in the correspondence he clothed the Defendant with plenary power as the purchase price of the interest in question, that is that he employed Defendant to buy for him one-half the Burner lode claim, giving him *carte blanche* as to purchase price.

Such a theory, however, is wholly untenable in view of the correspondence between the parties as a whole, and is flatly contradicted by Plaintiff's proposition in his letter of April 23rd, 1888, that Defendant shall buy "one-half" of the half interest, or an undivided one-quarter interest, if he can not get the entire one-half interest for $1,500.

Thus far Defendant had not written "I can buy a one-half interest in the Burner lode claim for $1,500," or for any other sum, "shall I buy it for you?" No definite sum at which the one-half interest in question could certainly be secured being known at that date, the assent of the Plaintiff to the purchase of such one-half by Defendant for Plaintiff could not have been given prior to April 13th, 1888. "The parties must assent to the same thing in the same sense; the minds of both must meet as to the same thing."

Hartford, etc., R. R. Co. vs. Jackson, 63 Amer. Dec., 177.

Had the Plaintiff, in accordance with the proposition of the Defendant as made in the postscript to his (Defendant's) letter of April 13th, made to Defendant a legal tender of $1,500 — which sum Defendant suggested that Plaintiff had better send him if he concluded to take an interest in the claim—then the assent of the Plaintiff, the *sine qua non* on his part, in the first essential factor in the alleged contract, *might perhaps be a legal inference from such tender*, but when instead of such full legal tender of $1,500, Plaintiff sent Defendant, under date of April 23rd, 1888, *merely a bank draft for $500*, drawn by the First National Bank of Cleveland, Ohio, upon some bank in New York (see exhibit 9 and 10, pages 52 and 53 of Transcript), and instructs Defendant to telegraph him "for the other $1,000," saying at the same time," "If you can't buy all of his interest (clearly for $1,500 but no more), buy half of it," it is as plain as the sun at noonday in a cloudless sky, that at the date we have reached in our review of the record in this case, no assent of the Plaintiff had ever been given either positively or definitely nor even impliedly by any inference however finely drawn, to a purchase of the interest herein involved for any greater sum than $1,500.

Passing now to the second stage in this transaction (for the negotiations between these parties is clearly separable into two periods), it appears from the record that some time in May, 1888, Defendant finally purchased the one-half interest in dispute in the Burner lode mining claim, but, contrary to the allegation upon that point in Appellant's brief, *without using in making such payment any money belonging to Plaintiff*, the $500 sent to Defendant by Plaintiff with the latter's letter of April 23rd, 1888, being on June 5th, 1888, (some time after the purchase of the one-half interest in dispute had been completed) still in the bank in the same form in which it was received, that is, as a draft on a New York bank drawn by the First National Bank of Cleveland (see pages 39, 41 and 42, and exhibit 12, page 55 of Transcript). If, however, defendant had used the $500, then in his hands but belonging to plaintiff, as part of the purchase price of the one-half interest in question, he could not thereafter have maintained an action against Plaintiff to compel him to take the one-half interest so purchased at any higher figure than $1,500. "A *special* agent who is employed about one specific act, or certain specific acts only, does not bind his principal unless his authority be strictly pursued."

Dunlap's Paley on Agency, 201.

June 5th, 1888, Defendant wrote to Plaintiff, *and for the first time in the history of this transaction made a definite offer of the partnership with plaintiff in the Burner lode mining claim. Of partnership* we say, and not of *agency*, the latter being the erroneous theory upon which the Defendant in this case has proceeded from the first, as is clearly shown by the fact that the bill of complaint herein alleges that a contract was entered into between the parties, whereby Defend-

ant agreed to purchase the entire Burner lode mining claim for the joint benefit of himself and Plaintiff, while the evidence shows that the Defendant from the very beginning of his negotiations with Plaintiff and prior thereto owned an undivided one-half interest in the claim.

Now as to this definite offer of Defendant, its nature, its terms; and whether in this offer, and Plaintiff's action and inaction thereon, any more than in the first very indefinite proposition and Plaintiff's cunning dallying therewith, there is disclosed that "reciprocal and mutual assent of the parties" without which no contract can be created?

In his letter of June 5th, 1888, Defendant writes as follows: "In relation to the Burner mining property, *I have got it all and paid for it*, and surveyed for patent, but am doing $100 worth of work so as to have over $600 worth of work, which will be a necessary improvement. I am sure of two veins on the ground, but it cost more than $1,500. It all cost me about $4,000, all told, *but I was determined to have it if it cost more. Property is rising in Park canyon.* Under the circumstances I had to take a deed in my own name, and of course had to pay for it on delivery of the deed, and came near losing it at that. Others would take it at higher figures. *Now friend A. A. Wenham, send me $1,500, and I will make you a deed of an undivided one-half of the entire Burner property, free of all work excepting the $100 which I am now doing, which will be over $600, sufficient to get the patent;* then you will have to stand one-half the expenses of the patent, which only is the regular price in this district and territory. *As I have received $500 from* you, so the balance, $1,500, will make the purchase money of your part $2,000. I will you more in detail in my next letter." (See exhibit 12, page 54 Transcript.)

While this letter is in transit from Butte, Montana, to Cleveland, Ohio, a letter from Plaintiff to Defendant, dated June 4th, 1888, was on its way from the latter to the former city. In that letter Plaintiff refers to the $500 draft sent to Defendant by letter of April 23rd, 1888, as "the $500 I have in your care," and "the money I have with you," (see exhibit 15, page 57 Transcript) clearly showing that Plaintiff did not consider that the remittance made by him on April 23rd, 1888, to Defendant, was on account of purchase of the half interest in question *without limit*, as it must necessarily have been to sustain the theory of Appellant's counsel in this suit, but that the $500, though then in the hands of the Defendant, was still the personal property of Plaintiff; merely a payment on account "with a string to it," which he could still dispose of as he chose, and in proof thereof he proposed in said letter of June 4th, 1888, that the said $500 should be loaned to one C. C. Frost.

And now we ask when, and how, if at any time, or in any manner, did Plaintiff accept this first and definite offer of the Defendant as presented in his letter of June 5th, 1888?

It is not disputed that Plaintiff remained absolutely silent as to the acceptance or rejection of said offer until April 6th, 1889, just ten months from the date such offer was made. What does he then do? Does he write, "Your offer of June 5th, 1888, to sell me the one-half interest in the Burner lode claim for $2,000 is received, I accept the offer?" Nothing of the kind. On the contrary, after so long delay he writes a letter worthy the diplomatic astuteness of a Talleyrand, the artful duplicity of Rodin, and the alleged crafty ambiguity of a Pickwick. A noteworthy letter indeed it is. Noteworthy more for what it conceals than for what it states. Here it is,

dated April 6th, 1889: "*Not having heard from you since some time last April or May*, I have felt as though you had neglected *my last letter, written some time in the early part of June last.* However, as you are the senior, I accept the situation. I enclose check on New York for $1,000. Please let me know how much you figured to be the balance. You now have fifteen hundred ($1,500) dollars in total from me. *I have thought it quite strange that I have not heard from you.* However, I supposed that you would write when you were ready, but as it was a matter of business, I thought it my duty to write to you now, *as time was drawing close.* I hope you enjoy good health and that your tunnel is progressing as well as could be expected. I hope some day you may reap a rich harvest out of your enterprises. Still such enterprises and their results, are only temporary, we cannot take the results of our material labors with us, but our spiritual labor's development we carry with us into an indefinite eternity." (See exhibit 13, page 55 of Transcript.)

The very first statement is directly contradicted by the record, and Plaintiff's attempted explanation of that contradiction (see pages 30 and 31, Transcript) cannot satisfy this Court, any more than it did the Court below, however satisfactory it may have been to the witness. Yet it is this letter that Appellant's Counsel holds up before this Court and unblushingly says: "The Court (below) erred in finding that there never was a ratification of the action of the Defendant in purchasing the half interest in the Burner lode claim for $2,000." (See eighth specification of error.) It is this letter that is claimed as evidence proving the assent of the Plaintiff to the proposition of the Defendant by letter of June 5th, 1888, and yet it opens with an indirect and specious denial of the receipt

of the very proposition it is claimed to accept. A most evident *suppressio veri* the legal equivalent of a *suggestio falsi.*

With Defendant's letter of June 5th in his possession, in which he had been clearly and definitely advised that Defendant had been "obliged" to take a deed to himself for the half interest in the Burner lode claim, about which he had therefore been corresponding, "obliged," Defendant says, because, as he testifies, "I had no money of his (Plaintiff's) that I could use (See page 39 of Transcript); but that Defendant was willing to sell to him (not purchase for him) a one-half interest, (of which he, Defendant, was sole owner,) for the sum of $2,000, and to allow him credit on that price for the $500, which Plaintiff had the very day before written of to Defendant as "the money I have with you," Defendant saying further that, *upon receipt of $1,500* more he would deed to the Plaintiff an undivided one-half interest in the Burner lode claim; with such a definite and distinct offer as that in his possession, and after retaining it for nearly ten months he writes under date of April 6th, 1889, *and denies, with words most cunningly and carefully chosen, the receipt of any such offer*, at the same time expressly referring to his own letter of June 4th, 1888, which it now appears crossed in the mails Defendant's letter of June 5th, 1888. It would not do at that late date, (if it had been a fact that Plaintiff had heard nothing from Defendant about this matter from April or May of 1888, when the extreme known limit of the purchase price of this interest had been $1,500 until April 6th, 1889,) to send defendant $1,000, and at the same time to couple with an indirect denial of the receipt of the Defendant's letter stating that he must pay $2,000 for the one-half interest, the deceptive inquiry, "Please let me know what you figured the balance to be." Figured the balance to be?

Where had there been in the correspondence up to May, 1888, any indication of any *balance* figured or not figured over $1,500?

But we have not yet a complete analysis of this most adroit composition of the Plaintiff's. He is not content with the statement in the first clause of his letter, which is contradicted by the record, but he reiterates his denial of any correspondence about this claim passing between himself and Plaintiff between May, 1888, and April, 1889. He says: "I have thought it quite strange that I had not heard from you." Note that that statement was written after, as Plaintiff "*thought*" (when before the Court below), he had specifically answered the very letter that he now so cunningly denies the existence of. If the assent absolutely essential, on the part of the Plaintiff, to any proposition made by Defendant, anywhere, or at any time in the history of this transaction, to purchase or sell for or to Plaintiff a one-half interest in this Burner lode claim, really exists in this remarkable epistle of April 6th, 1889; this collection of "cunningly devised fables," then such assent was certainly written with invisible ink, and only through the medium of a glass having the power of the famous "peep-stone" that the Angel Moroni gave to Joseph Smith, and with that glass in the hands of the Plaintiff, can such assent be deciphered?

But that there may not be the shadow of a doubt as to Plaintiff's deliberate purpose to ignore Defendant's candid and definite offer of June 5th, 1888, until from some source (possibly from his friend Pomeroy, who was, as the record shows, a mutual acquaintance of the parties in this suit), he found out that he might, even after a silence of ten months, be able to secure an interest in this claim

(*if he could only make the Plaintiff believe that he was under some legal obligations to deed him such interest*), he writes under date of May 20th, 1889, as follows: "On April 6th I sent you, by registered letter, $1,000, to apply on my one-half of the Burner lode claim, together with the $500 I advanced you some time ago. Please let me know if you received the draft all right, *and the amount due you still*, and I will remit you so you can mail me deed of same. Please let me hear as soon as possible so I may know that the draft arrived safely." (See exhibit 16, page 58 Transcript.) Still no reference whatever to the letter *at that very time in his possession*, and by which for the first time in this transaction (then of more than eighteen months duration) he was advised as to the exact amount he must pay to secure the disputed one-half interest in the Burner lode claim.

To all these artful dodgings, this Machiavellian duplicity, the Defendant finally, in a most business-like way, and with a candor refreshingly in contrast with the cunning of Plaintiff, replies under date of May 30, 1889, "I can't make you a deed to or in the Burner ground," (see exhibit 14, page 56 of Transcript) and he might very pertinently have added, "you have over reached yourself, Mr. Wenham, you are 'hoist with your own petard.'"

It is this very natural and reasonable treatment by the Defendant of the Plaintiff's inaction and deceit in regard to Defendant's letter of June 5th, 1888, that Appellant's Counsel says, "Every jurist in the country would decide was a ratification of the actions of the Defendant." We are fain to believe that from his list of "every jurist in the country" he must except this Court, as the Court below ventured to except itself.

SECONDLY, and very briefly: To the creation of a contract there must be contributed "a good and valid consideration." Upon this point the conduct of this case on the part of the Plaintiff has been most noticeable, for never in oral argugument and nowhere in brief of Appellant's Counsel is the word "consideration," as definitive of an essential factor in a contract to be found. In his brief no argument whatever is advanced in support of this third specification of error, to-wit: "The Court erred in deciding that the offer of defendant to to purchase for the Plaintiff a one-half interest in the Burner lode mining claim was a voluntary offer and not binding on Defendant," and it is much to the credit of Counsel's learning in elementary principles of law that he *omitted that specification entirely from his brief*, it not even being found under the head of "Errata," although such omission may indicate forgetfulness of rules of practice.

Appellant answers only with a silence of the Sphynx to the query, "Where, in this entire transaction, was there any suggestion even of any consideration whatever, as moving from Plaintiff to Defendant?"

Upon this point, however, most vital of all to the support of Plaintiff's contention, the Court below said: "This was a voluntary undertaking and it does not appear that Plaintiff was to pay anything or Defendant to ask anything for this service.

Where, then, we ask, is the contract pleaded in the bill? It has existence only in the *lucus a non lucendo* theory, and upon that theory the Court will judge it.

To argue the proposition that there can be a contract in contemplation of law without a consideration of some

kind, or that a court of equity will decree specific performance of an agreement when no consideration exists, would be to subject Appellee to the rebuke administered to Bro. Jones by Chief Justice Marshal: "Bro. Jones there are some things that a United States Court sitting in equity may be presumed to know," but we contend that the decision of the Court below must be affirmed upon the following propositions and the precedents supporting the same:

"An acceptance to be binding must be distinct, unconditional, and not vary the terms of the offer and be communicated to the other party without unreasonable delay."

Waterman on Specific Performance, 174, and cases cited.

"There must be mutuality as to obligation and remedy."

Id. 261 and cases cited.

"A contract is complete when the answer containing the acceptance of a distinct proposition is despatched by mail, if it be done, with due diligence after the receipt of the letter containing the proposal and before any intimation is received that the offer is withdrawn."

Id. 179 and cases cited.

"Contracts which are voluntary, or where there is no consideration on the part of him who seeks performance will not be specifically enforced though under seal."

Id. 247 and cases cited.

"The Court will refuse specific performance of a voluntary

or gratuitous contract or a covenant tha is not supported by a valid legal consideration."

Lawson Rights, Remedies and Practice, 5, 4270.
In re Webb, 49 California, 541.
Hickman vs. Grimes, 10 Amer. Dec., 714.
Buford's Heirs vs. McKee, 1 Dana, 107.
Black et al. vs. Cord, Harris & Gill, 2, 100.
Adams on Equity, 207.
Short vs. Price, 17 Tex., 397.
Express Co. vs. R, R. Co., 9 Otto, 191.

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